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No. A-899

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GRACE KIM AND JASON KIM, PETITIONERS

VS.

DONALD TAYLOR AND SUSAN TAYLOR, RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES
FROM THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

ROBERT ARNOLD
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ATTORNEY FOR THE PETITIONERS

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QUESTION PRESENTED

1. Whether there is a denial of Due Process of Law where: (a) petitioners seek appropriate and adequate injunctive relief against racial prejudice, harassment, and assault, (b) petitioners thereafter waive their right to a trial with respect to such orders in reliance upon a clear stipulation allowing entry of such orders as petitioners may deem necessary and appropriate, (c) the stipulation is thereafter not given effect, and, in consequence, (d) petitioners are without adequate and suitable protection and are instead subject to orders that are both underinclusive and overinclusive with respect to their situation.

PARTIES

[The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.]

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STATEMENT OF GROUNDS

ON WHICH JURISDICTION INVOKED

(i) The judgment of the Superior Court of California, County of San Bernardino is sought to be reviewed Said judgment was rendered on July 11, 1980, and entered on July 14, 1980.

(ii) The opinion of the Court of Appeal, Fourth District, Division Two, State of California was filed on December 7, 1981.

The denial of the petition for rehearing was filed on December 28, 1981 by the Court of Appeal, Fourth District, Division Two, State of California.

The denial of the petition for hearing was filed on February 3, 1982 by the Supreme Court of the State of California.

On April 23, 1982, the Hon. William H. Rehnquist, Associate Justice of the Supreme Court of the United States granted the application of counsel for petitioners for an extension of time for filing a

petition for writ of certiorari, the time for filing being extended to and including June 7, 1982.

(iii) (Not applicable)

(iv) The Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

This case involves section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part, "No State shall ... deprive any person of life, liberty, or property, without due process of law...."

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STATEMENT OF THE CASE

The petitioners, Jason Kim and Grace Kim, brought an action in the California Superior Court seeking, inter alia, preliminary and permanent injunctive orders. The Kims sought protection and peace from alleged repeated hostile actions perpetrated by their adjoining neighbors, who are the respondents herein, Donald Taylor and Susan Taylor: racial epithets, trespass, property damage, threats, assault and battery. During the pendency of the action, which was aggressively litigated over five years, evidence was amassed, photographic, documentary and testimonial, that would evince the egregiousness of the Taylors' actions over the many years. Such evidence would, the Kims anticipated, demonstrate the necessity for a comprehensive panoply of protections adequate to preclude repetition of respondents' conduct, and to protect the Kims from future harm.

During trial, counsel for respondents offered to stipulate to the entry of "permanent mutual restraining orders against all parties." One can surmise that respondents sought to: (1) avoid disclosure, upon the public record, of the explicit evidentiary material about to be introduced; and (2) reduce the possibility that the trier would find that an alleged severe battery had in fact occurred, in light of the specific evidence of other wrongdoing introduced. Petitioners' counsel rejected the proposal, expressing concern that respondents would reject particular provisions subsequently proffered by petitioners. Petitioners' counsel, rejecting such joint responsibility for draftsmanship, proposed instead that the lodestar governing the injunction be, quite simply, <u>whatever the petitioners would deem necessary</u>, provided only the provisions be mutual. The respondents agreed to

this procedure. (The colloquy to this effect is reported in the partial transcript set forth in the Appendix hereto at page A30 et seq.)

The trial then proceeded to conclusion in respect of certain ancillary issues, not relevant to this petition. Following trial, petitioners presented to the court, for inclusion within the Judgment, the injunctive orders they deemed necessary to afford them adequate and appropriate protection. (See page A34 et seq. of the Appendix hereto.) The court, however, to the petitioners' astonishment, rejected the proffered formulation, choosing instead to adopt a de novo approach to the issue of what injunctive provisions appeared to be adequate to the neighbors' circumstances. In consequence, the petitioners now find themselves restricted to, and restricted by, a permanent injunctive mechanism to which they did not stipulate, and as to

which they were deprived a trial on the merits. (See page A26 et seq. of the Appendix hereto.) The petitioners submit that the aforesaid conduct by the California trial court, and the sustaining thereof by the California appellate courts, is so totally devoid of support as to render it unconstitutional under the Due Process Clause of the Fourteenth Amendment.

MANNER IN WHICH FEDERAL QUESTION WAS RAISED

The Federal question involved in this case is whether petitioners were denied Due Process of Law, as guaranteed by the Fourteenth Amendment to the United States Constitution, by reason of being deprived of a trial on the merits in reliance upon a purported stipulation, which stipulation was in fact an imposture. This argument was asserted at four different junctures:

First, the argument was timely asserted during a post-trial, prejudgment chambers conference with the trial court judge, held for the purpose of attempting to enforce the stipulation.

Second, the argument was reasserted in petitioners' brief on appeal tp the California Court of Appeal, Fourth District, Division Two. Third, the argument was reasserted in the Petition for Rehearing to the Court of Appeal. Fourth, the argument was reasserted in the Petition for Hearing filed in the Supreme Court of the State of California.

It is well-settled that in framing a federal question, no particular form of words or phrases is required "if the record as a whole shows either expressly or by clear intendment that this was done...." N.Y. Ex Rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). "[I]t is not necessary that the question should appear on the record to have been raised,

and the decision made in direct and positive terms, ipsissimis verbis...." St. Louis I. M. & S. R. Co. v. Starbird, 243 U.S. 592, 598-99 (1917). Thus, in Braniff Airways v. Nebraska State Board, 347 U.S. 590, 598 (1953), the Due Process Clause was deemed invoked notwithstanding the failure of petitioner to mention it. What the petitioner therein did do below was to present the pertinent facts and contentions, and the Supreme Court held that, "[t]hough inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." 347 U.S. at 599.

Apart from this latitude that may be accorded a petitioner's presentation of a federal question, or the nexus of facts implicitly providing such presentation, it is further recognized that a party is not barred by failure to cite constitutional provisions when it is

clear that the lower courts have considered the relevant provisions. See, e.g., Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 217 fn. 3 (1968).

In the instant case it is manifest that petitioners presented, and the California courts considered, a Due Process contention. As in Braniff Airways, supra, the petitioners may not have intoned the particular phrase, but, as in Braniff, they asserted contentions, the resolution of which fell within the purview of the Fourteenth Amendment Due Process Clause.

The Opinion of the Court of Appeal (see Appendix) makes it plain petitioners alleged they had waived trial, in reliance upon a stipulation, and if the stipulation is not given effect, the petitioners have lost their day in court. As indicated in United States v. Armour & Co., infra, the foregoing constitutes

a violation of Due Process as guaranteed by the Fourteenth Amendment. Thus, petitioners' argument below, although inexplicit, invoked federal guarantees of Due Process.

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REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DEPRIVED PETITIONERS OF THEIR RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

Petitioners, over the course of a five-year, emotionally and financially consuming litigation, attempted to secure injunctive protections against racially-motivated harassment and assault perpetrated by the adjoining homeowners. The relief sought was resisted by respondents, up to the moment petitioners were about to introduce their evidence of respondents' conduct. Respondents then stipulated to accept such mutual restraining orders as petitioners alone would subsequently formulate (the "stipulation"). The substantial advantages secured by respondents in exchange for the stipulation were discussed in the Statement of the Case. As described hereinabove, the

trial court thereafter rejected petitioners' formulation, and proceeded to adopt a de novo approach to the issue of what injunctive protections were appropriate to the parties' situation. This erroneous procedure was followed notwithstanding the clear, bargained-for stipulation that empowered petitioners alone to be the arbiters of the scope of protection appropriate and necessary. Further, inasmuch as entry into the stipulation precluded the introduction of evidence as to previous acts of respondents' misconduct, the trial court was without guidance as to what might comprise suitable orders.

Where, as here, parties have waived their right to litigate the issues raised, they have raised a right guaranteed to them by the Due Process Clause of the Fourteenth Amendment. Where such a waiver is in reliance upon a bargained-for stipulation, the stipulation must be

respected, and construed as written, and the court's failure to give such effect to the stipulation will constitute a denial of Due Process.

A similar situation is illustrated in United States v. Armour & Co., 402 U.S. 673 (1971). The parties therein had earlier agreed to an antitrust consent decree, and thereby had waived a trial on the merits. The government then sought to modify said decree, which was clear on its face, under the guise of interpreting the consent decree and applying the decree to the purpose it was intended to serve. In rejecting this attempt, the Court stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost

> and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation. 402 U.S. at 681-682.

The Kims have likewise been deprived of Due Process of Law as guaranteed by the Fourteenth Amendment. The Kims invested, financially and emotionally, in five years of pretrial pleading,

discovery, law and motion, all in preparation for a trial they were never accorded. The Kims have been deprived of their liberty without Due Process of Law, as they now find themselves subject to permanent restraining orders that are both underinclusive and overinclusive in nature.

The underinclusive character of the insufficient injunctive orders constitutes a deprivation of the Kims' liberty to the quiet and safe enjoyment of their home and their privacy. At the same time, the injunctive orders are in several respects overinclusive, and Jason Kim finds himself the subject of restraining orders in a manner never intended, not the product of either stipulation or trial, and having no basis in fact.

The deprivation of Due Process of Law that occurred below, and the resulting deprivation of liberty, are in manifest violation of the Due Process Clause

of the Fourteenth Amendment to the United States Constitution.

2. THIS COURT SHOULD GRANT REVIEW PURSUANT TO ITS SUPERVISORY POWER TO CORRECT A GROSS MISCARRIAGE OF JUSTICE

It is respectfully submitted that the Court consider this case among the limited number wherein review is appropriate notwithstanding the absence of conflicting decisions, novel principles of law, or great public interest. Where the result below is unjust, plainly erroneous, and in particular, encompasses the deprivation of the litigants' right to a trial, certiorari jurisdiction should be exercised. See, e.g., Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 510 (1957); Thompson v. City of Louisville, 362 U.S. 199,202 (1960); Washington v. U.S., 357 U.S. 348 (1958).

Where the court below has, as here,

so arrantly departed from the accepted course of judicial proceedings, the need for the Supreme Court to exercise its ultimate responsibility for the proper functioning of the judiciary is heightened. The clear error committed by the trial court below was equaled by the indifference, approaching sarcasm, exhibited by the appellate court. For example, the petitioners' proffered injunctive order included a provision restraining the Taylors from engaging in any of the proscribed conduct against, not merely the petitioners, but also, family, friends, relatives, and the like. The court of appeal's response was to liken this sensible provision to one proscribing "eating fish on Tuesdays or swimming during the month of July," observing that the stipulation did not include such giving of "free reign to the imagination."

Grace and Jason Kim are naturalized citizens whose understanding of the American legal system was limited but who placed their faith in that system to protect them from racial prejudice, harassment and assault. After seven years of trial and appellate litigation, one must now explain to the Kims why their request that family and friends be able to visit them, in safety and without harassment, is caustically dismissed by the California Appellate Courts as comparable to a restraining order in respect of eating fish. It is respectfully submitted that the result below cannot be justified and is the proper subject of the exercise of this Court's jurisdiction.

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CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California court.

Respectfully submitted,

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JUN. 07 1982

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

GRACE KIM, Plaintiff, Cross-Defendant, and Appellant, v. DONALD TAYLOR and SUSAN TAYLOR, Defendants, Cross-Complainants, and Respondents.	4 CIVIL 25071 (Super.Ct.No. CW9214) O P I N I O N

APPEAL from a judgment of the Superior Court of San Bernardino County. Fenton E. Jones, Judge.* Affirmed.

Robert Arnold for Plaintiff, Cross-Defendant and Appellant.

Covington & Crowe for Defendants, Cross-Complainants and Respondents.

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*Retired judge of the municipal court sitting under assignment by the Chairperson of the Judicial Council.

THE COURT

As the result of a hostile encounter between adjoining homeowners, plaintiff Grace Kim sued defendants Donald and Susan Taylor seeking damages and injunctive relief for an alleged battery, invasion of privacy, and infliction of emotional distress. Defendants cross-complained against plaintiff and Jason Kim, plaintiff's husband, seeking damages and injunctive relief for an alleged encroachment. After a nonjury trial, during which the parties stipulated to entry of mutual restraining orders, the court decided to deny all other relief on both the complaint and the cross-complaint. Plaintiff appeals from the resulting judgment, except that portion of the judgment denying relief on the cross-complaint.

In accordance with established principles of appellate review, we shall summarize the facts by viewing the evi-

dence in the light most favorable to the parties prevailing below, resolving all conflicts in their favor and indulging in all reasonable inferences favorable to the judgment. (Aceves v. Regal Pale Brewing Co. (1979) 24 Cal.3d 502, 507.)

Donald and Susan Taylor purchased a new tract home on Coolcrest Avenue in Upland. Before moving in, Donald approached their neighbors to the north, Jason and Grace Kim, to discuss the possibility of sharing the cost of building a block wall on their mutual property line. Jason indicated a willingness to share expenses but never committed himself. He was frequently away on business trips.

When the Taylors moved into their new home nothing had been settled about the wall. Donald Taylor was becoming concerned because a swimming pool was under construction in his yard but city

authorities would not permit its completion until the area was fenced. Donald Taylor approached Grace Kim as she was walking in her yard. She told Donald her husband was away on business. Her aloof manner angered Donald, who called her a snob. Jason Kim learned of the conversation and refused to discuss the wall until Donald apologized. Donald sent an apology letter, though he did not think he had anything to apologize for, but the wording was unsatisfactory to the Kims. The Taylors then constructed a grapestake fence at their own expense. This fence was built on the Taylor's property, parallel to and 18 inches from the common property line with the Kims. The Kims constructed two block walls perpendicular to the grapestake fence. One wall ran along the rear boundary of the Kim's property and the other projected out from the Kim's house or garage. The walls stopped at the property line,

18 inches from the grapestake fence.

About 11 a.m. on March 1, 1975, Donald Taylor, looking out a rear window of his house, noticed a piece of 2 x 4 lumber leaning against his grapestake fence. He went outside and, observing Grace Kim in her back yard, asked her to remove the lumber from his fence. She told him to remove it himself. Donald went out a gate at the rear of his property and proceeded to the back corner of the grapestake fence. He observed that the 18-inch gaps between the grapestake fence and the beginnings of the two block walls had been closed by temporary barriers consisting of plywood braced with a plastic trash can and a diagonal 2 x 4 about 12 feet long. Removing the barrier closest to him, he slid the plywood back against the block wall and moved the 2 x 4 and the trash can across onto the Kims' property. He started to walk along the 18-inch strip to remove the other

temporary barrier when Grace Kim stepped into his path and told him to get off her property. Donald replied that he was on his own property.

In the meanwhile, Susan Taylor had gone out her front door and approached the second temporary barrier from the front side. She now called out: "Get off our property, you Jap." At these words, Grace Kim turned around and Donald Taylor walked past her and joined his wife. They removed the second temporary barrier and returned to their house.

A short time later, Grace Kim telephoned a neighbor, Sharon Smith, and recounted the incident. Grace Kim said something about Susan Taylor "pushing" her and Sharon asked: "You mean she hit you?" Grace answered: "No. I wish she had. Then I could sue."

In April 1975, Grace Kim commenced the present action. Her version of the encounter was that she agreed to remove

the temporary barriers and while doing so Susan Taylor snuck up behind her and hit her in the middle of the back with an 18-inch length of 2 x 4.

During the course of the trial, the parties stipulated to entry of "comprehensive" and "permanent mutual restraining orders against all parties to the Action." After the court had announced its intended decision in favor of defendants on the complaint, plaintiff's counsel was directed to prepare the injunction order. Defendants objected to the order drafted by plaintiff's counsel and were directed by the court to draft an alternative. The court accepted the defendants' version and judgment was entered accordingly. No findings were requested or made.

On appeal, plaintiff contends (1) the decision is not supported by substantial evidence, (2) the court erred in admitting the testimony of Sharon Smith

regarding her telephone conversation with plaintiff, and (3) the revision of the injunction provisions violated the stipulation and was an abuse of discretion.

I

Dr. Elmer Thomassen, an orthopedic surgeon, testified as a witness for plaintiff. He examined plaintiff on March 21, 1975, three weeks after the encounter with defendants. He diagnosed a contusion of the lower dorsal spine. There was no discoloration of the skin or other sign of recent trauma. An X-ray revealed no abnormalities. The contusion could have been caused by a blow or by a fall or by lifting a heavy object. Dr. Thomassen prescribed medication to reduce swelling and relax the muscles. Plaintiff was seen several times during the ensuing three years, reporting continued pain and tenderness.

Plaintiff contends this expert testimony entitles her as a matter of law to a

judgment in her favor on the cause of action for battery. She argues that causation of illness is a subject not within the competence of a trial judge or lay juror so that an expert medical opinion on such an issue is necessary and conclusive if not rebutted by other expert testimony. Because defendants did not call an expert witness to contradict Dr. Thomassen, plaintiff maintains that his testimony is conclusive proof that she was struck on the back with a 2 x 4 by Susan Taylor.

Plaintiff's position is not well taken. Assuming for the sake of argument that Dr. Thomassen's testimony was conclusive as to all matters within the scope of his expertise, the testimony established only that plaintiff suffered from a back injury three weeks after the encounter with defendants that could have been caused by a blow, a fall, or lifting a heavy object. Dr. Thomassen did not even

venture an opinion as to when the injury might have occurred. Whether the injury was caused by a blow from Susan Taylor was an entirely separate factual question which could not be conclusively proven by medical diagnosis and which was the subject of sharply conflicting testimony. 1/ Resolution of this conflicting testimony was the task of the trial judge acting as trier of fact in the absence of a jury. On the record before us, the trial judge's determination may not be disturbed.

II

Next, plaintiff contends that the court erred in admitting Sharon Smith's testimony about the telephone conversation

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1/ There was evidence that plaintiff had consulted doctors about a back problem in 1969-1970. Also, Sharon Smith testified that plaintiff had complained to her of back pain before the March 1 incident. Thus the trier of fact could infer that plaintiff used her preexisting back problem as the basis of a false accusation against Susan Taylor.

during which she asked plaintiff whether Susan Taylor struck her and plaintiff replied that she wished Susan Taylor had struck her so she could sue. Plaintiff made a timely objection at trial to this evidence on hearsay grounds. Defendants replied that it was admissible as an admission by a party opponent, a declaration against interest, or a spontaneous declaration. The trial court overruled the objection without indicating the basis of the ruling.

Plaintiff maintains that the testimony did not qualify as the admission of a party opponent because it included an incompetent legal opinion about the requirements for a tort action. The argument is preposterous.

The first step in analyzing a heresay problem is determining the relevancy of offered evidence. (Kessler v. Gray (1978) 77 Cal.App.3d 284,291.) Here the evidence was not offered as a legal opinion nor was

it so considered by the trial court. It was offered to prove (1) that plaintiff was not struck by Susan Taylor, a historical fact of obvious relevance, and (2) that plaintiff wished she had been struck so that she could sue, evidence of plaintiff's state of mind relevant to show that the accusation was probably fabricated because of plaintiff's desire for revenge by litigation. The testimony was properly admitted for these purposes under Evidence Code sections 1220 and 1250. 2/

2/ Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

III

During the testimony of Jason Kim, plaintiff's husband, plaintiff's counsel asked what problems he had experienced with defendants. Cousel for defendants objected to this line of inquiry on relevancy grounds, stating that if the evidence was offered to support the request for injunctive relief defendant would stipulate to entry of permanent mutual restraining orders. Plaintiff's

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(Fn. 2 cont.)
Evidence Code Section 1250 provides:
"(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
"(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
"(2) The evidence is offered to prove or explain acts or conduct of the declarant.
"(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

counsel agreed to join the stipulation provided the restraining orders be "as comprehensive as each of us can conceive." The court inquired whether defendants would agree to an injunction in terms "as comprehensive as he [plaintiff's counsel] wishes, as long as it's mutual?" Defendants' counsel replied in the affirmative and plaintiff's counsel abandoned that line of inquiry.

After trial, plaintiff's counsel submitted a proposed injunction which appeared to be directed solely against defendants except that at the end was a statement that the provisions of the injunction were mutual. Defendants objected that this proposed order appeared to assign more blame to them and therefore was not truly mutual. The trial court agreed and accepted an alternative order prepared by defendants' counsel. In addition to its neutral format, the

alternative differed from plaintiff's version in several respects, which we will mention later. The parties are agreed that there was a valid stipulation; they disagree about the scope and meaning they assign to its terms.

"Stipulations must be given a reasonable construction with a view to giving effect to the intent of the parties and 'the language used will not be so construed as to give it the effect of an admission of a fact obviously intended to be controverted, ...' [Citations.]" (Palmer v. City of Long Beach (1948) 33 Cal.2d 134,144.) "A stipulation of counsel, like other agreements, must be construed by an objective standard. It is immaterial that one of the parties had an undisclosed intention of belief as to what it meant." (Consolidated Dock & Storage Co. v. Superior Court (1971) 18 Cal.App.3d 949, 952.)

Plaintiff contends, first, that she

was entitled to an injunction in the format she proposed, drawn in her favor and against the defendants but with a provision for mutuality tacked on at the end like an afterthought. In support of this proposition, she argues (1) defendants did not seek this kind of injunctive relief in their cross-complaint 3/ whereas she had requested it in her complaint, (2) the provision for mutuality was merely the result of a technical legal requirement unrelated to the merits of the action ("Obviously, it is only out of mechanical deference to the vernerable principle that injunctive relief be mutual that Appellant and her husband find themselves the objects of injunctive provisions herein"), and (3) the evidence at trial, had it been admitted, would have shown that

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3/ The cross-complaint sought injunctive relief only against an alleged encroachment by the Kims' block wall.

defendants were guilty of numerous acts of hostility toward plaintiff and her husband.

None of these arguments can withstand scrutiny. There is no legal requirement for mutuality in an injunction; plaintiff waived her right to object on the ground that the relief was outside the scope of the cross-complaint by accepting the stipulation for a mutual injuction; and, finally, we cannot indulge in speculation about what the evidence might have shown had the parties not stipulated to the mutual injunction.

As we view it, the question is one of interpretation. The two requirements mentioned in the stipulation were that the objective meaning of mutuality in this context required that the injunction be drawn in a neutral fashion which did not imply that any party was more at fault than any other party. Consequently the trial court was correct in rejecting the

format of plaintiff's proposal and accepting instead defendant's alternative.

Next, plaintiff complains that the words "disturb" and "threaten" were dropped from a provision forbidding acts which "harass, molest, annoy, disturb, threaten, assault, batter, touch, direct obscene gestures toward, or utter racial slurs to, the other parties hereto."

This provision is a fine example of the old legal custom of carrying redundancy to absurd lengths. We can conceive of no conduct, nor has plainiff suggested any, which would qualify as a threatening or disturbing act without at the same time being a harassing, annoying, or molesting act. Thus the terms were properly deleted as surplusage.

Plaintiff's proposed order prohibited defendants from engaging in any of the proscribed conduct indirectly through the agency of third parties and stated

that such parties would "include, without limitation, spouse, friends, family, relatives, employees, agents, servants, corporations and neighbors, the last category including, without limitation, Jerry Smith, Michael Smith, Sharon Smith, David Krause, and Connie Krause."4/ The injunction as signed by the court prohibited all parties from "directly or indirectly conspiring, petitioning, importuning, requesting or otherwise causing third parties to effect the proscribed conduct set forth...above."

Plaintiff agrues merely that the "specificity of the provision" in her proposed version "facilitates future enforcement of the order." We disagree. The specification of abstract categories such as friends and employees is

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4/ Connie Krause, like Sharon Smith, testified as a witness for defendants. The other named individuals are evidently spouses or close relatives of the two witnesses.

completely unnecessary inasmuch as the parties are prohibited from effecting the proscribed conduct through any third party. The naming of individuals is unnecessary for the same reason and is also inconsistent with the mutuality requirement because it singles out people who have apparently been allied more closely with defendants than with plaintiff.

Plaintiff's version of the injunction included a provision restraining defendants from engaging in any of the proscribed conduct against plaintiff's "spouse, family, friends, relatives, employees, servants, or associates." This provision was omitted from the judgment. Plaintiff contends that absence of this provision "results in a failure to adequately safeguard the persons potentially endangered by Respondents' conduct."

As previously mentioned, the

stipulation required only that the terms of the injunction be comprehensive and mutual. The trial court could reasonably conclude that this proposed provision violated the mutuality requirement because these third parties -- relatives, friends, servants, etc. -- were not before the court and could not be enjoined from engaging in any of the proscribed conduct. Also, the requirement that the injunction be comprehensive obviously carried certain implied limitations. This was not an invitation to counsel to give free reign to his imagination, permitting him to enjoin, for example, swimming during the month of July or eating fish on Tuesdays. Clearly the term "comprehensive" referred to the issues raised by the pleadings or at trial. Even with this implied limitation, the scope of the injunction remained imprecise, to say the least, and the trial judge was required to exercise his discretion to select its

provisions. As there was nothing alleged in the pleadings or discussed at trial about hostile acts directed at third parties, the trial court's deletion of this provision was not an abuse of discretion.

The trial court also eliminated a provision prohibiting the parties from misrepresenting the outcome of the action. Again, this was an issue not explicitly addressed in the pleadings or at trial, and its deletion was not an abuse of discretion.

We conclude that the injunction granted by the court was consistent with the terms of the stipulation and there was no abuse of the trial court's discretion.

The portions of the judgment appealed from are affirmed.

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

COURT OF APPEAL - FOURTH DIST.

FILED

DEC 28 1981

ROBERT L. FORD, Clerk

GRACE KIM, Plaintiff, Cross-Defendant, and Appellant, v. DONALD TAYLOR and SUSAN TAYLOR, Defendants, Cross-Complainants, and Respondents.	4 CIVIL 25071 (Super.Ct.No. CW9214) RULING IN RE PETITION FOR REHEARING

THE COURT:

The petition for rehearing is DENIED.

Morris, J.

Acting Presiding Justice

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

GRACE KIM, et al.

Plaintiff, Cross-defendants,
and Appellants,

vs.

DONALD TAYLOR and SUSAN TAYLOR,

Defendants, Cross-complainants,
and Respondents.

RULING IN RE PETITION FOR HEARING

CW 9214
4 CIV 25071

(Postal-card ruling attached
as next sheet)

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

I have this day filed Order HEARING DENIED (Feb. 3, 1982)

In re: 4 Civ. No. 25071
Grace Kim

vs.
Donald Taylor and Susan Taylor

Respectfully,

Clerk

(COVINGTON & CROWE
Pleading Paper
Letterhead)

FILED: JULY 14, 1980

Attorneys for Defendants
and Cross-Complainants

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO

GRACE KIM, Plaintiff, vs. DONALD TAYLOR, etc., et al., Defendants.	CASE NO. CW 9214 JUDGMENT AFTER TRIAL BY COURT
DONALD TAYLOR and SUSAN TAYLOR, Cross-Complainants, vs. GRACE KIM, et al., Cross-Defendants.	

This cause came on regularly for trial on April 23 and 24, 1980, in Department 4-ONT of the above entitled court, the Honorable Fenton E. Jones, Judge Presiding; Plaintiff and Cross-Defendants appearing by Robert Arnold, and Defendants and Cross-Complainants appearing by Robert F. Schauer of Covington & Crowe; and evidence both oral and documentary having been presented by both parties and the cause having been argued and submitted for decision, and findings of fact and conclusions of law not having been requested;

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff GRACE KIM take nothing by her complaint and that Cross-Complainants DONALD TAYLOR and SUSAN TAYLOR take nothing by their cross-complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all parties bear their own costs and disbursements and arbitration fees in this action.

Pursuant to stipulation made in open court during the trial of this action with further hearing held on July 11, 1980, interpreting the stipulation made during the trial of this action,

IT IS ORDERED, ADJUDGED AND DECREED that GRACE KIM, DONALD TAYLOR, JASON KIM and SUSAN TAYLOR are hereby permanently restrained and enjoined from engaging in any of the following conduct:

1. Trespassing upon the real property of the other parties hereto including, without limitation, causing objects to fall upon such property.

2. Causing damage to the real or personal property of the other parties hereto.

3. Harassing, molesting, annoying, assaulting, battering, touching, directing obscene gestures toward or uttering racial slurs to the other parties hereto.

4. Shouting at, talking to, or otherwise communicating with the other

parties except when a situation where communicating or cooperating is required to thwart some emergency or peril.

5. Invading the privacy of or disturbing the peace of the other parties hereto.

6. Uttering derogatory or disparaging remarks concerning the other parties hereto.

7. Directly or indirectly conspiring, petitioning, importuning, requesting or otherwise causing third parties to effect the proscribed conduct set forth in Items 1 through 6 above.

Dated: July 11, 1980

/s/
FENTON E. JONES
Judge of the
Superior Court

COURT OF APPEAL, FOURTH DISTRICT, DIV. 2

STATE OF CALIFORNIA

GRACE KIM, Plaintiff, vs. DONALD TAYLOR, etc., et al., Defendants.	CASE NO. CW 9214 4 CIVIL 25071 REPORTER'S TRANSCRIPT
DONALD TAYLOR and SUSAN TAYLOR, Cross-Complainants, vs. GRACE KIM, et al., Cross-Defendants.	

Partial Verbatim Transcript as follows:

Q By Mr. Arnold: Mr. Kim, have you had friendly relations with your neighbors, the Taylors?

A I wish I could, but no.

Q When did your problems first begin with the Taylors?

A Since November of 1974.

Q What problem began in November 1974?

MR. SCHAUER: Your Honor, I'm going to object to this whole line of testimony. I don't really see how that's relevant to the issue here, and if it goes to the issue of restraining orders, as I've advised the Court before on this matter, I would be stipulating that the Court can make permanent mutual restraining orders against all parties to the action. If it's for some other purpose, then I don't see the relevancy of it.

THE COURT: Yes, Counsel.

MR. ARNOLD: If Mr. Schauer is stipulating to the necessity of the restraining orders and is also stipulating that they be as comprehensive as each of us can conceive, then I'm prepared to move onto another line of questioning.

MR. SCHAUER: My feeling on that is, one, they are made mutual and, two, that they are restraining orders in the nature of -- I can't think of anything more

comprehensive than an order that says will not threaten, harass or annoy. They don't even have to be contacted, as far as I'm concerned.

THE COURT: Do you accept the stipulation?

MR. ARNOLD: I accept the stipulation provided that -- I can envision a particular kind of prescribed conduct, and I'm willing to make the prescription mutual, then that particular form of conduct can be included in the order. I wouldn't want to run into this situation with Mr. Schauer where a particular provision was necessary and here I was ready to elicit the testimony where it's in fact necessary. As long as we're in a situation of putting our heads together and making it comprehensive, then I think we can dispense with this.

THE COURT: Will you allow him to make it as comprehensive as he wishes, as long as it's mutual?

MR. SCHAUER: That's fine.

MR. ARNOLD: Under those conditions I'll move into another line of questioning.

THE COURT: Thank you. You may proceed.

(Robert Arnold Pleading
Paper and Letterhead)

SUPERIOR COURT, COUNTY OF SAN BERNARDINO

STATE OF CALIFORNIA

GRACE KIM, Plaintiff, Cross-Defendant, and Appellant, v. DONALD TAYLOR and SUSAN TAYLOR, Defendants, Cross-Complainants, and Respondents.	(Super.Ct.No. CW9214) (PROPOSED) ORDER IN RE PERMANENT INJUNCTIONS

The parties hereto having stipulated in open court at the trial of the above-entitled action to the entry of an order in re permanent injunctive relief, and a hearing having been held in a Law and Motion department of said court to clarify such stipulation,

IT IS ORDERED, ADJUDGED, AND DECREED

AS FOLLOWS:

The defendants and cross-complainants herein, DONALD TAYLOR and SUSAN TAYLOR, are hereby permanently restrained and enjoined from engaging in any of the following conduct:

1. Trespass upon the real property of the other parties hereto, including, without limitation, causing objects to fall upon such property.

2. Cause damage to the real property of the other parties hereto.

3. Harass, molest, annoy, threaten, assault, batter, touch, direct obscene gestures toward, or utter racial slurs to, the other parties hereto.

4. Shout at, talk to, or otherwise communicate with the other party, except in a situation where communication or cooperation is

required to thwart some emergency or peril.

5. Invade the privacy of, or disturb the peace of, the other parties hereto.

6. Utter derogatory or disparaging remarks concerning the other parties hereto.

7. Misrepresent to third parties the outcome of the within litigation.

IT IS FURTHER ORDERED that the defendants and cross-complainants, DONALD TAYLOR and SUSAN TAYLOR, are permanently restrained from engaging in the aforementioned proscribed conduct indirectly, by conspiring, petitioning, importuning, requesting, or otherwise causing third parties to effect the proscribed conduct. Such third parties include, without limitation, spouse, friends, family, relatives, employees, agents, servants, corporations,

and neighbors, the last category including, without limitation, Jerry Smith, Michael Smith, Sharon Smith, David Krause, and Connie Krause.

IT IS FURTHER ORDERED that the defendants and cross-complainants, DONALD TAYLOR and SUSAN TAYLOR, are permanently restrained and enjoined from directing the aforementioned conduct against the spouse, family, friends, relatives, employees, servants, or associates of the other parties hereto.

IT IS FURTHER ORDERED that the plaintiffs and cross-defendants herein, GRACE KIM and JASON KIM, are, owing to considerations of mutuality, permanently enjoined and restrained from engaging in any of the acts of conduct enumerated above.

IT IS SO ORDERED.